LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAY 13 1963
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

**No. 1013.**

DAN W. SHAFFER,

*Petitioner,*

*v.*

JOSEPH E. SEAGRAM & SONS, INC.,

*Respondent.*

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

T. MURRAY ROBINSON
*Attorney for Respondent*
300 Hightower Building
Oklahoma City 2, Okla.

*Of Counsel:*
MATHIAS F. CORREA
JOHN W. NIELDS
WILLIAM A. JANSEN
80 Pine Street
New York 5, N. Y.

May 10, 1963

# INDEX.


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Questions Presented | 2 |
| Counter-Statement of the Case | 2 |
| The Writ Should be Denied | 11 |
| I. The Court of Appeals Fully Complied with the Provisions of Rule 52(a) of the Federal Rules | 12 |
| II. The Court of Appeals Properly Applied the Oklahoma Statute of Frauds | 16 |
| Conclusion | 19 |

## Table of Authorities.

### Cases.


| | PAGE |
|---|---|
| *Hays Drilling Co.* v. *Sartain*, 108 Okla. 181, 235 Pac. 615 (1925) | 17-18 |
| *United States* v. *United States Gypsum Co.*, 333 U. S. 364 | 12-13 |


### Statutes.


| | |
|---|---|
| 8 Del. Code §157 | 5 |
| 15 Okla. Stat. Ann. §136(4) | 6, 10, 11, 13, 16, 17, 18 |


### Other.


| | |
|---|---|
| Rule 52(a), Fed. R. Civ. P. | 2, 11, 12, 15 |
| Hearings before the Committee on the Judiciary of the House of Representatives on H. R. 10479, 67th Cong., 2d Sess. (1922) | 12 |
| 2 Corbin, *Contracts* (1950) | |
| §430 | 16 |
| §467 | 18 |
| §495 | 16 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

---

**No. 1013**

---

DAN W. SHAFFER,

*Petitioner,*

*v.*

JOSEPH E. SEAGRAM & SONS, INC.,

*Respondent.*

---

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Respondent respectfully submits that the petition for a writ of certiorari in this case should be denied for the reasons hereinafter set forth.

### Opinions Below.

The United States District Court for the Western District of Oklahoma entered judgment in favor of respondent on its complaint (R. 1-3), and in favor of petitioner on his amended counterclaim (R. 5-9), without opinion. The findings of fact and conclusions of law of that court (R. 10-15) are not reported but are annexed to the petition as Appendix A.

Upon appeal by respondent to the United States Court of Appeals for the Tenth Circuit, judgment on the counter-

claim was reversed and directed to be entered in favor of respondent. The opinion of the Court of Appeals, entered October 25, 1962, is reported at 310 F. 2d 668 and is annexed to the petition as Appendix B. A petition for rehearing was denied December 10, 1962 (App. 23a).

By order of Mr. Justice White, entered March 8, 1963, the time for filing of the petition was extended to and including April 11, 1963 (App. 26a).

## Questions Presented.

(1) Did the Court of Appeals, in reversing the decision of the District Court, comply with the provisions of Rule 52(a) of the Federal Rules of Civil Procedure that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"?

(2) Did the Court of Appeals, in reversing the decision of the District Court, correctly apply the Oklahoma statute of frauds to the facts of the case?

## Counter-Statement of the Case.

In 1954, the outstanding common stock of Riceland Corporation, a Delaware corporation ("Riceland"), was owned almost entirely by members of the Bronfman family, residents of Montreal, Canada (R. 159-61).* The balance of the outstanding common stock, 799 shares, was owned by M. R. Shaffer, a first cousin of petitioner Dan W. Shaffer, who was on retainer to the Bronfman family as an advisor on its investments in the oil and gas industry (R. 56; Exs. 3-5, R. 37, 38, 132-34).

---

*The Bronfman family also owns a controlling interest in the Canadian parent of respondent (R. 67, 160). The family was represented in matters relevant to this case by Edgar Bronfman, then a resident of Montreal and now President of respondent and a resident of New York (R. 157-58, 160).

At that time Riceland was largely inactive, and had almost no assets other than a tax loss carryover in an amount in excess of $200,000 (R. 58, 161). The Bronfman family had undertaken to revive it and to reengage it in the business of drilling oil and gas wells under contract to other companies (R. 59-60).

M. R. Shaffer was directed by the family to recruit someone to take charge of these operations (R. 60). In this connection, he approached petitioner (R. 62). The latter indicated his interest (R. 87), and his name was thereupon submitted for consideration by the Bronfman family (Ex. 1, R. 37, 38, 130-31). Petitioner was approved by the family and was employed by Riceland commencing April 16, 1954, at a salary of $12,000 plus an expense account and an automobile (R. 23, 29, 87). In addition, Riceland loaned petitioner $10,000 to enable him to purchase a home (R. 30).

On July 8, 1954, petitioner was elected President and a director of Riceland (Exs. 18, 18A, R. 94, 143-44).

The District Court found that, after petitioner had begun his employment, the parties made a separate oral agreement to give petitioner an option to buy 30% of the Riceland common stock at $1 per share (Findings Nos. 4, 5, R. 11, App. 2a).

M. R. Shaffer testified that the figure of 30% was recorded in a memorandum submitted by him to the Bronfman family in late April or May, 1954* (R. 66, 81). This memorandum was not produced at the trial and has never been found by either of the parties.

The record shows the following about that memorandum:

---

* The reference in Finding No. 17 (R. 14, App. 4a-5a) to the date of submission of the memorandum as 1955 is apparently a typographical error (cf. R. 81).

(1) It was at most only a recommendation to the Bronfman family by M. R. Shaffer, as he himself stated (R. 66, 81);

(2) M. R. Shaffer also testified that the memorandum not only recommended a stock participation for petitioner but also advocated a 10% participation for M. R. Shaffer himself (*ibid.*). The record shows that M. R. Shaffer never received any participation as a result of this recommendation (R. 70-71, 82);

(3) Although the District Court found that the memorandum had been signed by M. R. Shaffer (Finding No. 17, R. 14, App. 5a), there is no support whatsoever for this in the record.

A year later, on April 6, 1955, Edgar Bronfman wrote petitioner that his salary was to be raised to $17,000 per annum, retroactive to January 1, 1955 (Ex. 2, R. 37, 38, 131). That letter went on to state:

> "Common stock participations by yourself and Mr. Hicks [Riceland's Vice President and drilling superintendent] are under advisement and, when the details have been examined, I should like to discuss this with you." (R. 132)

This of course is utterly inconsistent with the contentions of petitioner and the finding of the District Court that a 30% stock option had already been agreed upon. Yet this is in writing and is in evidence as a writing; the unfound memorandum is not.

Not only is this letter inconsistent with petitioner's claims and the finding of the District Court, but so are the three other writings which were put in evidence and relied upon, and which are hereinafter set forth in full:

(1) On June 2, 1955, E. A. Bratton, an accountant for the Bronfman family and a Vice President of Riceland

(R. 67, 165; Ex. 18-A, R. 94, 144), wrote to petitioner as follows:

> "Dear Dan: Re: Shareholding Interests. This will confirm the shareholding participations in the outstanding common stock of Riceland Corporation for yourself and Orville W. Hicks as follows:
>
> | | | |
> |---|---|---|
> | Dan W. Shaffer..... | 5% | 4,242 shares |
> | Orville W. Hicks..... | 2% | 1,696 " |
> | Other Shareholders ..... | 93% | 78,900 " |
> | | 100% | 84,838 " |
>
> "The cost of the shares will be $1.00 a share, with terms of payment to be arranged.
>
> "It is also understood that the 799 shares owned by Mr. M. R. Shaffer will form part of your common stock participation and that Mr. M. R. Shaffer will be reimbursed $799.00 representing his cost.
>
> "A directors' meeting will be required to formally confirm your stock participation. I suggest, however, that this meeting be deferred for the time being." (Ex. 3, R. 37, 38, 132)

It is conceded in the record (R. 49) that no directors' action was ever taken with respect to any stock option in favor of petitioner, in spite of this letter and in spite of the requirements of the Delaware Corporation Law that a stock option can only be granted by action of the Board of Directors (8 Del. Code §157).

(2) Several days later, on June 6, 1955, Bratton wrote to M. R. Shaffer instructing him to sell the 799 shares to petitioner, as follows:

> "Dear Ray: With further reference to the shares of Riceland owned by you, it has been the understanding that they will be purchased by Dan Shaffer. I am told that this should be done immediately, even before Dan takes down the balance of his share

option. The cost for your shares is $1.00 a share or $799.00 total.

"Will you please undertake with Dan to transfer the shares as soon as you can?" (Ex. 4, R. 37, 38, 133)

This transaction concededly never occurred (R. 82, 112).

(3) Simultaneously, Bratton wrote to petitioner, enclosing a copy of his letter to M. R. Shaffer and stating as follows:

"Dear Dan: Attached is copy of letter to Ray in connection with the purchase by you of his 799 shares of Riceland.

"There is one point, Dan—if you wish to defer purchase until you get your full participation or for personal reasons you do not wish to take down the shares now, an alternative method would be for Riceland to redeem the shares; they would then be included in your total participation when issued later.

"Whichever way you decide is satisfactory to the other directors, Dan, but you might let me know what you decide." (Ex. 5, R. 38, 133-34)

Whether these writings are taken separately or taken together, they are entirely insufficient to satisfy the Oklahoma statute of frauds, 15 Okla. Stat. Ann. §136(4), and the Court of Appeals so held as a matter of law (App. 18a-21a).

In late 1955, effective as of June 30, 1955, all the outstanding stock of Riceland was sold to The Huntington Creek Corporation, a Pennsylvania corporation ("Huntington Creek") wholly-owned by respondent (Ex. 21, R. 122, 155-56). At that time Riceland still had a deficit position; its common stock, $1 par value, was sold for 79¢ per share (*ibid.*).

On September 26, 1956, petitioner executed a promissory note to Riceland in the principal amount of $10,000 in consideration of the loan previously made (R. 2, 30). This

is the note upon which, less a credit hereinafter described, the complaint was based (R. 1-2).

Sometime in 1956 an independent management consultant had been retained by respondent to survey Riceland's operations (R. 170-71, 173). After an investigation, he reported to respondent's management that he was dissatisfied with petitioner's conduct of those operations (R. 173-74). Steps were thereupon taken to remove petitioner from office as President of Riceland.

On January 22, 1957, Huntington Creek, which was then the sole stockholder of Riceland, removed petitioner from the Riceland Board of Directors (Ex. 21, R. 122, 150). On the same day petitioner was then removed as President of Riceland by a majority of the remaining directors, who did so "because of his lack of ability properly to perform the duties of such office" (Ex. 21, R. 122, 152). Petitioner was granted one month's severance pay, in the amount of $1,416.67 (R. 3); this and earlier salary deductions, aggregating $450.05, were credited against the principal amount of the note (*ibid.*).

Petitioner testified (R. 107) that on the day he was removed from office he raised the matter of his alleged stock option with a representative of respondent, and on February 13, 1957, he wrote Edgar Bronfman as follows*:

> "Dear Edgar: I wish to take this opportunity to congratulate you on your recent promotion to the presidency of Joseph E. Seagram & Sons. I know that this gives you and yours a great deal of personal satisfaction.
>
> "Edgar, as you know, I have been asked to resign as President and Director of the Riceland Corpora-

* The similar letter dated February 6, 1957 (Ex. 11, R. 41, 139) was apparently only a preliminary draft of the later letter (cf. Ex. 14, R. 41, 141).

> tion. Therefore, I feel that it is time for Riceland Corporation to deliver on my 30% common stock participation in the company. As you know, I have promised 10% of this participation to Orville Hicks, Vice, President and Director of Riceland Corporation.
>
> "Accordingly, at this time I will appreciate it very much if you will let me have a letter from you as soon as possible advising that you are making the necessary arrangements for Riceland to perform under my stock option agreement." (Ex. 13, R. 41, 140-41)

On February 15, 1957, Edgar Bronfman responded, saying in part:

> "Dear Dan: I see where you have chosen to make certain demands on this corporation, which I assume are based on certain general discussions we had when Riceland Corporation was owned by various members of the Bronfman family.
>
> "Let me correct your convenient memory. The figures you mentioned are absurd. No such nonsense was ever considered. Secondly, you now do not have, nor did you ever have a stock option agreement.
>
> "Furthermore, when Joseph E. Seagram & Sons, Inc. (represented by a subsidiary) purchased the shares of Riceland Corporation, I told you that any discussions we had had about a stock participation were obsolete, as the situation had radically altered." (Ex. 15-A, R. 42, 141-42)

Although Mr. Bronfman did not appear as a witness at the trial of this case, the record of his pretrial deposition was included in the record (R. 123-24, 157-75). In his deposition, Mr. Bronfman freely conceded that a stock option had been under consideration, but stated that the grant of

any stock option to petitioner was subject to two conditions precedent:

> (1) Riceland had to overcome its deficit surplus position;
>
> (2) Riceland had to stop drilling wells exclusively for Frankfort Oil Company, a division of a subsidiary of respondent whose General Manager was petitioner's cousin M. R. Shaffer, and obtain contracts from other companies (R. 158-59).

Petitioner completely failed to comply with these conditions, at least through 1955 when Riceland was sold to Huntington Creek (R. 158-59; cf. Finding No. 11, R. 13, App. 4a).

On June 7, 1957, Riceland demanded payment of the note (R. 3), which was refused by petitioner on the basis of the alleged stock option (Ex. 17, R. 45, 142-43).

As of July 31, 1957, all the outstanding stock of Riceland was transferred from Huntington Creek to respondent (Ex. 21, R. 122, 155-56). Thereafter, Riceland was dissolved and all of its assets were distributed to respondent (R. 19-20).

Although the alleged stock option is claimed to have been entered into in the spring of 1954 (R. 66, 81), and although petitioner's claim to any stock option is categorically denied in the foregoing letter of February 15, 1957, petitioner sought to assert his alleged claim to a stock option only by way of a counterclaim in the action against him on the note (R. 5-7).* This action was insti-

---

* Petitioner's second counterclaim, for his salary as President of Riceland during the period from his removal from office through the dissolution of Riceland, was dismissed without prejudice (R. 16).

tuted on March 5, 1958 (R. 2), over a year after the aforesaid letter from Mr. Bronfman denying any stock option.

The District Court held that petitioner had entered into a binding stock option agreement with respondent (Findings Nos. 3-5, R. 11, App. 1a-2a; Conclusion No. 3, R. 15, App. 3a), that the unfound memorandum of April, 1954 and the three letters of June, 1955 constitute "definite, complete, connected memoranda" (Finding No. 17, R. 14, App. 5a) sufficient to satisfy the Oklahoma statute of frauds (Conclusion No. 3, R. 15, App. 6a), and that in any event petitioner's services to Riceland had constituted a part performance in satisfaction of the statute (*ibid.*).

The District Court also gratuitously found that the stock option transaction was "tainted with fraud of Edgar Bronfman and he was guilty of fraud from the inception of the agreement" and had "intended to use the Oklahoma Statute of Frauds and the corporations involved to perpetrate fraud" (Finding No. 15, R. 14, App. 5a).

The remarks of the District Court immediately after the trial below, reflecting its unsupported observations with respect to fraud, as well as other things, are set forth in the record (R. 124-29).

The Court of Appeals reversed. It held that the four documents were insufficient to satisfy the statute as a matter of law. Petitioner does not seek review of this basic aspect of the decision of the Court of Appeals.

The Court of Appeals also rejected the District Court's conclusion (Findings Nos. 4, 9, R. 11, 12, App. 2a, 3a; Conclusion No. 3, R. 15, App. 6a) that the statute had been satisfied by the services rendered to Riceland by petitioner. The Court of Appeals concluded that those services were performed under petitioner's employment agreement and did not constitute a part performance of or consideration for the alleged option agreement (App. 22a).

It is this aspect of the decision of the Court of Appeals to which the petition for a writ of certiorari is primarily directed, reliance being placed upon the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. In this connection it should be noted that the provisions of Rule 52(a) were specifically called to the attention of the Court of Appeals in petitioner's petition for rehearing addressed to that court. The petition was denied.

The Court of Appeals also held that it was error for the trial judge to make the finding of fraud on the part of Edgar Bronfman, on the ground that petitioner "did not plead fraud nor does the record show any mention of it until the trial judge, in his oral findings from the bench at the conclusion of the trial, injected it into the case", and that "There is not a word of evidence in the case to justify such a finding" (App. 22a). Petitioner does not seek review of this aspect of the decision of the Court of Appeals.

## The Writ Should Be Denied.

This case is a private litigation involving the application of the Oklahoma statute of frauds to particular facts. It presents no question under federal law other than whether the Court of Appeals paid proper heed to the provisions of Rule 52(a). As will be pointed out below, the Court of Appeals' disposition of the case is fully in accord with the decisions of this Court with respect to Rule 52(a) and the Court of Appeals properly applied the Oklahoma statute of frauds.

Such of the petition as is directed to the practices and policies of this Court with respect to the granting of certiorari in diversity cases amounts to nothing more than an

effort to have this Court grant certiorari where there are no grounds for the granting.*

## I.

### The Court of Appeals Fully Complied with the Provisions of Rule 52(a) of the Federal Rules.

In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, this Court set forth the meaning of Rule 52(a) as follows:

> "In so far as Finding 118 and the subsidiary findings were based by the District Court on its belief that the *General Electric* rule justified the arrangements or because of a misapplication of *Masonite* or *Interstate Circuit*, errors of law occurred. These we can, of course, correct. In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the

* In this connection, it may be noted that as early as 1922 Mr. Chief Justice Taft had the following to say with respect to the function of this Court:

> "No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal." Hearings before the Committee on the Judiciary of the House of Representatives on H. R. 10479, 67th Cong., 2d Sess. 2 (1922).

> opportunity of the trial court to judge of the credibility of the 'witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (333 U. S. at 394-95. Footnotes omitted.)

In the instant case it is abundantly clear from the opinion of the Court of Appeals that "the reviewing court on the entire evidence [was] left with the definite and firm conviction that a mistake [had] been committed" by the District Court. Indeed, it is clear that the Court of Appeals was left with the definite and firm conviction that many mistakes had been committed by the District Court.

Contrary to the decision of the District Court, the Court of Appeals held that as a matter of law the documentary evidence involved was not sufficient to establish an existing and binding agreement such as is required to satisfy the Oklahoma statute of frauds, stating that "To hold otherwise would frustrate the purpose of the statute." (App. 21a). Petitioner does not even seek to review this basic aspect of the decision of the Court of Appeals.

As noted above, the Court of Appeals also decided that it was error for the trial judge to make the finding of fraud because, as noted above, petitioner "did not plead fraud nor does the record show any mention of it until the trial judge, in his oral findings from the bench at the conclusion of the trial, injected it into the case", and that "There is not a word of evidence in the case to justify such a finding" (App. 22a). Here petitioner expressly states in his petition (Pet. 26) that he is in agreement with the determination of the Court of Appeals.

Before disposing of the finding of fraud, the Court of Appeals had the following to say with reference to the alleged part performance of the stock option agreement:

> "There remains to be considered the question of part performance as found by the trial court. In this connection, appellee contended in the court below and the court found[14] that the alleged oral agreement vesting a 30% stock option in appellee was not a part of his employment agreement but was made after he had accepted and commenced such employment and that it was a separate and divisible oral contract. In short, appellee's position was and is that there were two separate and distinct agreements between the parties, i. e., the employment agreement and the alleged oral agreement vesting a 30% stock option

---

"[14] Finding No. 4 reads as follows:

"'The verbal agreement with defendant, vesting an option in him to purchase a total of thirty per cent of the outstanding common stock of the Riceland Corporation, and to give him a valid written, enforceable option to that extent, was not a part of defendant's employment agreement, but was made in 1954 after defendant had accepted and commenced employment with said corporation; it was a separate and divisible oral contract and was supported by the executed consideration of services previously rendered and then being rendered by defendant to the Bronfman family and the Riceland Corporation, both being one and the same.'

> in him. That being the case, the performance of services under the employment agreement did not constitute a part performance of the alleged 'option' agreement. In fact, the record conclusively establishes that the only consideration mentioned as to the alleged stock option was $1.00 per share. No part of such consideration was paid or tendered at any time and, therefore, there has been no part performance of the alleged agreement to take it out of the prohibition of the statute of frauds." (App. 21a-22a)

Thus, the Court of Appeals clearly disclosed its definite and firm conviction that the District Court was wrong, disagreeing with the second half of Finding No. 4 (R. 11, App. 2a), Finding No. 9 (R. 12, App. 3a), and Conclusion of Law No. 3 (R. 15, App. 6a). It would be hard to find stronger language than that used by the Court of Appeals when it said, "In fact, the record conclusively establishes that the only consideration mentioned as to the alleged stock option was $1.00 per share." (App. 22a)

That the Court of Appeals considered its action to be in compliance with Rule 52(a) is also shown by the fact that the petition for rehearing, specifically addressed to Rule 52(a), was denied by the Court of Appeals.

While the Court of Appeals was clearly entitled to disagree with the District Court on a matter of fact, it should also be noted that the conclusion of the Court of Appeals is in full accord with the applicable law on the subject of the statute of frauds and part performance.

> "The third generally stated requirement is that part performance will not make an oral contract enforceable unless it is such as to be directly 'referable' to that contract. There is so much variation in the ordinary wordings of this requirement that it cannot be reduced to any very definite form; it must be explained rather than stated. * * *

> "It is believed that the principal idea that is struggling for expression is that the part performance must be clearly evidential of the existence of a contract—it must be such as would not ordinarily have taken place in the absence of a contract and therefore is not reasonably explicable on some other ground." (2 Corbin, *Contracts* §430, [1950]*)

In the instant case where the petitioner contended below and the District Court found that the stock option agreement was not a part of defendant's employment agreement but was made after defendant had accepted and commenced employment, it is clear both as a matter of fact and of law that defendant's services were the discharge of his obligations under his employment contract and in no sense referable to the alleged stock option agreement. The part performance relied upon is in no way indicative of the existence of the alleged stock option agreement, as it is fully explicable on the ground of the employment contract.

## II.

## The Court of Appeals Properly Applied the Oklahoma Statute of Frauds.

The major portion of the opinion of the Court of Appeals is directed to an analysis of the writings relied upon and to the question of whether these writings are sufficient to satisfy the Oklahoma statute of frauds. Petitioner does not even seek a review of the determination

---

* While this is found in the chapter entitled "Interests in Land-Effect of Part Performance of Oral Contract", Professor Corbin's discussion makes it clear that the same considerations apply to an oral contract for the sale of goods. E.g., 2 Corbin, *Contracts* §495 (1950). As is pointed out in Point II hereof, there is a question under the Oklahoma statute of frauds whether services can constitute part performance of a contract for the sale of goods.

of the Court of Appeals that these writings are not sufficient to satisfy the Oklahoma statute of frauds.

Petitioner's argument that his services should have been considered sufficient to make the alleged stock option agreement enforceable under the Oklahoma statute of frauds has not only been covered in Point I above, but is also based upon a misplaced reliance upon *Hays Drilling Co. v. Sartain*, 108 Okla. 181, 235 Pac. 615 (1925). Petitioner has misrepresented that decision. The *Hays* case involved an oral agreement for services in exchange for shares of stock having an aggregate par value of $1,000. After the services were rendered by plaintiff, defendant tendered the shares in accordance with the oral agreement. Plaintiff, however, refused the tender and sued for $1,495, claiming that the oral agreement was unenforceable under the statute of frauds. The sole basis of the decision of the Supreme Court of Oklahoma was that plaintiff could not perform his part of the contract according to its provisions, and then repudiate it and require defendant to perform in a manner other than provided. In the language quoted by petitioner (Pet. 22), the court was not discussing the statute of frauds at all but was merely pointing out that the facts before it were similar to those in earlier Oklahoma decisions where precisely the same claim had been rejected. It said in full:

> "There can be no question, but that the alleged oral agreement was not clothed with the sanctity of an enforceable contract, and that the plaintiff at his option, without suffering peril, could either carry it out or disregard it. But the question here is, since the plaintiff has fully carried out his part of the contract, can he repudiate the same and require the defendant to respond to him otherwise than as is provided by the alleged contract itself, when he pleads the same as the basis for his recovery in lien?

> In other words, the plaintiff has fully performed his part of what he pleads was a contract, the defendant has tendered full compliance, as it pleads, therewith. The performance by the plaintiff was in the nature of services fully rendered and benefits fully received by defendant, rather than money paid. We think the position of the plaintiff is, as a matter of law, the same as if he had paid to the defendant so much money for the stock, then decided to rue the bargain and bring suit for the recovery of the money, notwithstanding the fact that the defendant stood ready and willing to deliver that for which the money had been paid to it. Whatever may be the apparent holdings from other courts, we think the principle is settled in the case of Schechinger *v.* Gault, 35 Okl. 416, 130 P. 305, Ann. Cas. 1914D, 468." (235 Pac. at 616)

Thus, the *Hays* case does not stand for the proposition that services may constitute such performance as satisfies the Oklahoma statute of frauds with respect to a contract for the sale of goods.

The other cases relied upon by petitioner in support of this proposition arose in states other than Oklahoma and in states having the conventional statute of frauds language that a contract for the sale of goods may be enforced if something has been given in earnest to bind the contract or in part payment. 2 Corbin, *Contracts* § 467 (1950). The Oklahoma statute of frauds, on the other hand, only recognizes the payment of "some part of the purchase money" as sufficient performance to make a contract for the sale of goods enforceable.

However, the Court of Appeals did not reach the question whether services may constitute such performance as to make a contract for the sale of goods enforceable under Oklahoma law, because of its conclusion that the services involved were rendered under the employment agreement

and did not constitute a part performance of the alleged option agreement.

## Conclusion.

For the reasons stated, the writ should be denied.

Respectfully submitted,

T. Murray Robinson,
*Attorney for Respondent,*
300 Hightower Building,
Oklahoma City 2, Oklahoma.

*Of Counsel:*

Mathias F. Correa,
John W. Nields,
William A. Jassen,
80 Pine Street,
New York 5, New York.

May 10, 1963